

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs January 12, 2010

**WARREN CURNUTT v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Giles County**  
**No. 13828 Stella Hargrove, Judge**

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**No. M2009-00346-CCA-R3-PC - Filed February 18, 2010**

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Petitioner, Warren Curnutt, was convicted of two counts of rape of a child. *See State v. Warren Curnutt*, No. M2006-00552-CCA-R3-CD, 2007 WL 1482390, at \*1 (Tenn. Crim. App., at Nashville, May 22, 2007). As a result, he was sentenced to an effective sentence of thirty years. On direct appeal, this Court upheld Petitioner's convictions. *Id.* Petitioner subsequently sought post-conviction relief, arguing that the trial court and State erred in various aspects during trial and that he received ineffective assistance of counsel. After a hearing, the post-conviction court denied the petition for relief. Petitioner seeks a review of the post-conviction court's decision. After a review of the record, we conclude that Petitioner has failed to show that he received ineffective assistance of counsel. Accordingly, the judgment of the post-conviction court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

M. Wallace Coleman, Jr., Lawrenceburg, Tennessee, for the appellant, Warren Curnutt

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Mike Bottoms, District Attorney General, and Christy Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### *Factual Background*

Petitioner was indicted for and convicted of two counts of rape of a child in October of 2003 for incidents that involved his ex-girlfriend's daughter, C.E.<sup>1</sup> *Id.* According to this Court's opinion on direct appeal, C.E. continued to visit Petitioner and her step-sister after the couple stopped dating. The following testimony occurred at trial:

C.E. testified that on a night near the middle of her fourth grade school year, she went to Appellant's home to work on a science project. C.E. fell asleep on the couch, while Appellant stayed up in the kitchen, working on the project. Appellant got up and took a shower, after which C.E. asked him for a glass of tea. Appellant brought C.E. a glass of tea and sang "Hush Little Baby" to her.

Sometime later, after C.E. fell asleep, Appellant woke her up. C.E. stated that Appellant was naked. Appellant removed C.E.'s clothing and put his penis into her vagina. Appellant then placed his penis in C.E.'s mouth. C.E. stated that the ordeal lasted "about two hours," during which Appellant told her that he loved her and she made "daddy feel good and really, really special." Eventually, Appellant's wife noticed that he was not in bed and called out for him. Appellant got up, put on his clothing, and went back to the bedroom with his wife.

According to C.E., at the conclusion of her fourth grade school year, she participated in "field day" at school. After school that day, C.E. went to Appellant's house to spend the night. C.E. testified that the next morning she was in the living room when Appellant came out of the bathroom wearing a towel. Appellant told the victim he had a "surprise" for her and told her to go to his bedroom. C.E. refused, so Appellant picked her up over his shoulder and carried her to the bedroom, where he slammed and locked the door. Appellant then took off his towel and removed C.E.'s clothing. At that point, C.E. testified that Appellant put his "worm" in her mouth. Appellant then inserted his "worm" into her "coochy." [FN2] C.E. stated that Appellant "kept pushing it in and out, in and out, until it really hurt. And this went on for 10

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<sup>1</sup>It is the policy of this Court to to refer to minor victims of sexual abuse by their initials only.

minutes.” During this time, Appellant told C.E., “[Y]ou make daddy feel special. Don’t tell anybody what daddy’s doing to you and what I have done to you. . . . You will get me in very big trouble.” C.E. stated that Appellant’s penis was “actually in her body” as opposed to touching her vagina. C.E. stated that someone knocked on the front door of the house, and Appellant got up, went into the bathroom and got a washcloth. Appellant used the washcloth to wipe some “green looking stuff” from his “worm” and her “coochy” before he got dressed and answered the door. C.E. did not know where the “green looking stuff” came from, but it was on both Appellant’s penis and her vagina. C.E. put her clothes back on at that time. Appellant’s brother was at the front door and wanted to show off his new haircut.

FN2. The victim used the terms “worm” and “coochy” to describe the penis and vagina, respectively.

Eventually, C.E. told her mother’s best friend, Joyce Baker, about the incidents. C.E. was crying and asked Ms. Baker not to tell anyone about what happened. Ms. Baker asked C.E. to tell her mother what was going on and accompanied C.E. the next morning while she told her mother.

*Id.* at \*1-2.

Petitioner was questioned by authorities and stated that he “was aware of the accusations against him, but that there was not a whole lot he could say about them.” *Id.* at \*2. Appellant admitted to one instance where he woke up with an erect penis and wiped something off of the victim’s leg that he claimed was sweat. *Id.* at \*2-3.

Appellant went on to admit that he slept in the same bed with the victim nearly all her life, and that he usually woke up with an erection. Appellant stated that he normally slept without clothing unless there were children in the bed, but admitted that on the occasion with the washcloth, his boxer shorts were off and his penis was erect and pressed against the victim. When Investigator Chapman questioned Appellant again about the “sweat” he wiped from the victim’s vaginal area, Appellant admitted that it was “sticky.” Appellant claimed that if he penetrated the victim, he “didn’t know [he] was there.” At the conclusion of the interview, Investigator Chapman asked Appellant if the victim was lying. Appellant replied, “From her point of view, probably not.”

*Id.*

The victim was interviewed by a Lisa Dupree, social worker at Our Kids Center in Nashville. Ms. Dupree's testified about her interview with C.E. as follows:

[W]hen questioned about the touching of her genital area, the victim began to cry. The victim reported penile-genital contact and penetration by Appellant. C.E. informed Ms. Dupree that the touching was on the inside and outside of her private area and that she touched her mouth to Appellant's "private." According to Ms. Dupree, when C.E. was asked if anything came out of Appellant's "private," the victim "made a facial expression consistent with the experience of a bad taste" and described "green snot-looking stuff." C.E. told Ms. Dupree that the substance went on both her private and in her mouth. After meeting with C.E. and her mother, Ms. Dupree recommended that she receive counseling specific for issues related to sexual abuse.

Petitioner presented proof at trial indicating that he was not alone with the victim during the time that the offenses were to have occurred. *Id.* at \*4. The defense also called C.E., the victim, to testify.

She testified that after field day, her mother picked her up at school and took her to Appellant's house. When they got to Appellant's house, she and her sisters watched television, played and then had a mud fight. She reaffirmed that the next morning, Appellant "did something bad" to her. The victim also restated that when she and Appellant were working on the science project, Appellant put his penis inside her, but she could not say how far. The victim described the act as painful.

At the conclusion of the proof, the jury convicted Appellant of two counts of child rape. After a sentencing hearing, the trial court sentenced Appellant to fifteen years for each child rape conviction, and ordered the sentences to run consecutively, for a total effective sentence of thirty years.

*Id.* at \*5.

Subsequently, Petitioner sought a direct appeal of his conviction. This Court affirmed his convictions. *Id.* Petitioner then filed a timely pro se petition for post-conviction relief. In that petition, Petitioner claimed that the trial court: (1) erred in failing to require the State to elect offenses; (2) erred by admitting a coerced and involuntary statement; (3) erred by admitting an incomplete transcript of Petitioner's statement; (4) erred by admitting an interview that occurred after Petitioner invoked the right to counsel; (5) erred by proceeding with an "unfairly prejudiced" jury pool; (6) erred by failing to instruct the jury on lesser

included offenses; and (7) erred by determining that the evidence was sufficient. In addition, Petitioner claimed that the State violated his constitutional rights by obtaining a coerced statement and failing to properly Mirandize Petitioner. Further, Petitioner claimed the State erred by prohibiting the victim from recanting her allegations against Petitioner. Finally, Petitioner alleged that he received ineffective assistance of counsel because counsel: (1) abandoned Petitioner's defense during trial; (2) failed to investigate and subpoena witnesses; (3) failed to advise Petitioner of lesser included offenses; (4) slept during portions of the trial; (5) was under the influence of alcohol and/or drugs during trial; (6) failed to properly prepare a recording and/or transcript of Petitioner's statement; (7) was disbarred after Petitioner's trial; and (8) improperly waived Petitioner's preliminary hearing.

The post-conviction court appointed counsel and held a hearing on the petition. At the hearing, Petitioner testified that he was interviewed twice prior to his arrest. Petitioner later hired trial counsel to represent him after the interviews but prior to his arrest. A second attorney from trial counsel's firm came on as co-counsel. Both lawyers represented him at trial, but co-counsel represented him at the sentencing phase. Petitioner was appointed a new lawyer after sentencing who represented him during the motion for new trial and on appeal. Petitioner informed the post-conviction court that his complaints regarding ineffective assistance of counsel related only to trial counsel.

According to Petitioner, trial counsel failed to defend the allegations set forth in the case. Petitioner insisted that the victim had falsely accused him of rape because of a custody dispute with the victim's mother. Trial counsel was aware of Petitioner's theory and failed to follow through with it at trial. Specifically, Petitioner claimed that trial counsel should have called the school principal and a secretary to testify because they witnessed a dispute between Petitioner and the victim's mother at school. Petitioner admitted that trial counsel questioned the victim's mother about the custody dispute at trial. Further, Petitioner admitted that after the victim's testimony, he was unsure what other witnesses could have been called to defend him from the victim's accusations. Petitioner was unable to explain how the trial would have ended differently had trial counsel utilized his strategy of the defense.

Petitioner stated that he chose not to testify based on trial counsel's advice. Petitioner complained that trial counsel slept, "leaned back in his chair, sleeping" during parts of the trial. Petitioner was not aware of trial counsel's actions until the court clerk and court reporter motioned for Petitioner to wake trial counsel. Co-counsel was present at the time and seated next to Petitioner, but her involvement was limited.

Petitioner also accused trial counsel of being under the influence of drugs or alcohol at trial based solely on the fact that trial counsel was in rehabilitation both before the trial and shortly after the trial. Petitioner had not personally witnessed trial counsel using drugs or

alcohol and did not see any behavior to indicate that trial counsel was intoxicated. Petitioner did see trial counsel drink an entire bottle of over-the-counter cold medicine during trial. Petitioner did not tell the court how he knew of trial counsel's visits to rehabilitation but informed the court that trial counsel had since been disbarred. Petitioner learned about the trial counsel's situation after his mother gave him an Internet printout from the bar association.

Petitioner also complained that trial counsel was unable to provide him with accurate transcripts of his statements to investigators. Petitioner explained that portions of the audio tapes were "inaudible." Despite this problem, Petitioner felt that trial counsel should have had the audio recording transcribed again, because the entire statement would have helped to show discrepancies in the time frame that the State advanced at trial. Petitioner admitted that portions of the statements were redacted for his benefit.

Finally, Petitioner claimed that trial counsel improperly waived a preliminary hearing. Petitioner claimed that the preliminary hearing would have allowed him to "properly prepare for the correct incident." Petitioner acknowledged, however, that he was not arrested until after his indictment and, therefore, was not entitled to a preliminary hearing.

Trial counsel testified at the hearing. Trial counsel admitted that he was disbarred in 2005 and the action was retroactive to 2004. He was disbarred for several reasons, including: (1) abandoning his practice; (2) conduct unbecoming an attorney; and (3) failure to complete his responsibilities for the Tennessee Lawyer's Assistance Program ("TLAP"). Trial counsel informed the post-conviction court that he was addicted to cocaine, prescription pills, and alcohol and that he voluntarily entered the TLAP program either immediately before or during his representation of Petitioner. When he enrolled in TLAP, he was placed into an inpatient facility for twenty-eight days. When he was released, trial counsel was able to practice law again. Trial counsel testified that his license was in good standing when he represented Petitioner and that Petitioner knew about his drug problem.

Trial counsel experienced a relapse shortly after Petitioner's trial. Trial counsel was readmitted for inpatient rehabilitation. The last day of Petitioner's trial was the last day that trial counsel practiced law. Trial counsel admitted that he was a drug addict and "shouldn't have been practicing law." Trial counsel was unable to say whether he provided Petitioner with effective assistance of counsel, stating that he did not "think [he could] render an opinion as to that, to be honest with you. Maybe at one time . . . ."

Trial counsel denied Petitioner's claim that he "abandoned" the trial strategy after opening arguments. Trial counsel explained that the strategy was to show how the State used its power to influence Petitioner in his diminished capacity. Trial counsel acknowledged that

the custody dispute was “part and parcel” of the trial strategy but not the sole theory of the defense. Trial counsel informed the post-conviction court that he spoke with both the principal and secretary prior to trial and chose not to subpoena them because they would have “destroyed” Petitioner’s case by siding with the victim. Trial counsel did not recall failing to request lesser included offenses.

Co-counsel also testified at the hearing. She sat second chair during Petitioner’s trial and attended about 75% to 80% of the pretrial meetings with trial counsel. Co-counsel, as a female, was responsible for cross-examining the female victim at trial. Co-counsel testified that trial counsel drank beer on the evenings of Petitioner’s trial but that he was not drinking to excess or taking any other drugs at the time. Co-counsel stated that trial counsel’s relapse occurred after the trial. Co-counsel did not remember trial counsel falling asleep during trial but admitted that “it could be true.”

Co-counsel took over the case after trial and prior to sentencing. After the trial was over, co-counsel realized that trial counsel’s problems were “a real issue.” She did not think that trial counsel was under the influence of drugs or alcohol during trial and did not notice any of the jurors observing trial counsel sleeping during trial.

At the conclusion of the post-conviction hearing, the post-conviction court entered an order denying relief. Specifically, the post-conviction court determined that the constitutional issues raised by Petitioner should have been raised at trial or on appeal and had no merit. Further, the post-conviction court determined that trial counsel did not render ineffective assistance of counsel. Specifically, the post-conviction court found that trial counsel did not abandon the theory of the defense. Trial counsel spoke with the principal and secretary prior to trial and determined that their testimony would have been detrimental. Further, trial counsel discussed trial strategy with Petitioner that was centered on revealing the State’s coercion of the confession. Next, the post-conviction court determined that all of the lesser included offenses were submitted to the jury. The post-conviction court also determined that even if trial counsel fell asleep during trial, Petitioner had the benefit of co-counsel and was therefore not prejudiced by trial counsel’s actions. Next, the post-conviction court found that trial counsel was not under the influence of drugs or alcohol during trial and that trial counsel’s subsequent disbarment was unrelated to Petitioner’s case. The post-conviction court determined that trial counsel was successful in getting a portion of Petitioner’s statement redacted and was not ineffective for failing to properly prepare a transcript of Petitioner’s statement. Finally, the post-conviction court determined that trial counsel did not provide ineffective assistance of counsel by waiving the preliminary hearing.

Petitioner now seeks a review of the post-conviction court’s denial of relief.

*Analysis*  
*Post-Conviction Standard of Review*

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

*Ineffective Assistance of Counsel*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994).



This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

On appeal, Petitioner claims that he received ineffective assistance of counsel because trial counsel behaved poorly in the courtroom and prejudiced Petitioner. Specifically, Petitioner complains that trial counsel fell asleep during trial and was a drug addict during his representation of Petitioner. Petitioner also complained that trial counsel “failed to timely raise issues” and “failed to call [Petitioner] as a witness to rebut the testimony of the victim.”

As pointed out by the State, two of Petitioner’s issues on appeal: (1) that trial counsel failed to raise timely objections and preserve issues for appeal; and (2) that trial counsel failed to call Petitioner as a witness at trial, were not raised in the petition for post-conviction relief. When an issue is not addressed with the post-conviction court, it will generally not be addressed on appeal. *Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005); *Tracy Alvin Armstrong v. State*, 2009 WL 2447659, \*3-4 (Tenn. Crim. App.). Moreover, in a post-conviction proceeding, “[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless” the claim is based upon a newly-recognized constitutional right with retroactive application or the ground was not presented as the result of State action in violation of the federal or state constitution. T.C.A. § 40-30-206(g); *see State v. Benson*, 973 S.W.2d 202, 208 (Tenn. Crim. App. 1998). Neither of the exceptions is present herein. We determine that these issues are waived. *See* T.C.A. § 40-30-106(d) (“The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.”); *see also* Tennessee Supreme Court Rule 28, section 5(E) (“The petition shall contain . . . (3) each and every error that petitioner asserts as a ground for relief, including a description of how petitioner was prejudiced by the error(s).”). Accordingly, we conclude Petitioner is not entitled to relief on this issue because he failed to comply with the rules governing post-conviction relief. “Furthermore, the plain error rule, which would otherwise permit an appellate court to address the issue sua sponte, may not be applied in post-conviction proceedings to grounds that would otherwise be deemed either waived or previously determined.” *Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009) (citing *State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000)) (footnote omitted). These issues are waived.

Petitioner’s remaining allegation of ineffective assistance is that he was prejudiced because trial counsel fell asleep during trial and battled a drug and alcohol addiction. The post-conviction court determined that the testimony of trial counsel was credible at the post-

conviction hearing. It is not the province of this court to revisit issues of credibility of witnesses. *Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Trial counsel testified that he was on antidepressants during the trial and was “not aware that he had fallen asleep, but was told later on that he had.” Co-counsel was aware that trial counsel fell asleep two times during trial but testified that she was present and did not see any jurors looking in trial counsel’s direction. The post-conviction court concluded that “if [trial counsel] fell asleep during the trial, Petitioner had the advantage of [co-counsel’s] skill and knowledge in seeing that his rights were protected.” In other words, Petitioner failed to establish that he was prejudiced by trial counsel’s actions. Indeed, Petitioner’s burden is to show that trial counsel’s actions somehow affected the outcome of the trial. *See Dennis D. Plemons v. State*, No. E2007-00080-CCA-R3-PC, 2008 WL 4117862, at \*5 (Tenn. Crim. App., at Knoxville, Sept. 8, 2008), *perm. app. denied*, (Tenn. Jan. 20, 2009) (“Although we cannot condone an attorney falling asleep at trial at any time, Petitioner did not introduce any evidence at the post-conviction hearing to establish that this alleged deficiency affected the trial.”) Petitioner in this case has failed to establish by clear and convincing evidence that he is entitled to post-conviction relief on the basis of ineffective assistance of counsel.

#### *Conclusion*

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JERRY L. SMITH, JUDGE